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788-945—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 521

SALVADOR PARDO-BOLLAND, PETITIONER

v.

UNITED STATES OF AMERICA

No. 601 Misc.

RENE BRUCHON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 348 F. 2d 316.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1965. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to

and including August 28, 1965, in both cases. The petition for a writ of certiorari was filed on September 2, 1965, in No. 521,[1] and on August 27, 1965, in No. 601 Misc. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Both petitioners raise the following issues:

1. Whether the district court erred in admitting testimony by government agents regarding information which they had obtained by electronic surveillance.

2. Whether the district court erred in refusing to order the United States to produce a pre-trial statement made to the French Sureté by a French national who was a prosecution witness.

Petitioner Bruchon alone raises the following additional issues:

3. Whether the district court erred in instructing the jury that certain items were instrumentalities of the crime.

4. Whether the evidence of possession of heroin was sufficient to support his conviction under count two.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of New York, peti-

[1] Although the petition itself was submitted to the Court on August 26, 1965, the record requirements of Rule 21 of the Rules of the Supreme Court were not met until September 2, 1965. Therefore, the petition in No. 521 was untimely filed. Rule 22(2).

tioners and a co-defendant were convicted of conspiracy to import narcotics and of violation of 21 U.S.C. 174 (I R. 427a–428a).[2] Petitioners were sentenced to eighteen and fifteen years' imprisonment, respectively, on each count, to be served concurrently, and to pay fines of $20,000 on each count (I R. 447a–448a).[3]

The evidence showed that in February 1964 Pardo-Bolland, who was then the Mexican ambassador to Bolivia, registered at a hotel in Cannes (France) under a false name using a false passport (I R. 90a–91a, 304a; II R. 15a–18a). During the next three days, there were numerous meetings in Cannes between Pardo-Bolland, co-defendant Arizti, and co-conspirators Coscia and Giacobetti (I R. 91a–93a, 98a, 100a, 103a, 106a; II R. 19a–20a).[4]

On February 15, Arizti, who was then the Uruguayan minister plenipotentiary, flew to Montreal, taking with him four suitcases which a porter had delivered to him at the airport terminal (I R. 107a–111a). Upon arrival in Montreal, Arizti was able

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[2] References are to the two independently paginated appendices filed in the court of appeals. They are now designated volumes I and II, respectively, of the record filed in this Court.

[3] Petitioners' co-defendant, Juan Carlo Arizti, was sentenced to ten years' imprisonment under each count, to be served concurrently, and to pay a fine of $20,000 under each count (I R. 447a–448a.) Arizti did not appeal his conviction.

[4] These individuals and petitioner Bruchon were under almost constant surveillance by Federal Bureau of Narcotics agents, who observed their movements, contacts, and meetings at all pertinent times in France, Canada, and New York.

to get his baggage through customs without an inspection, because of his diplomatic passport (I R. 112a). He checked them at a locker in the railroad station (I R. 112a, 121a–123a). Without his knowledge, the Canadian police, acting under the authority of writ of assistance, examined the suitcases (I R. 119a–121a, 133a). On discovering that they contained 62 kilograms of heroin, the police removed 61 kilograms of the heroin, replaced it with a like quantity of flour, and returned the suitcases to the lockers in the Montreal railroad station (I R. 147a–149a, 157a; II R. 20a–21a).

Arizti took the suitcases to New York and checked them, receiving four baggage checks (I R. 126a, 239a; II R. 22a–24a). About two hours later, federal narcotics agents seized and opened the four suitcases pursuant to a search warrant (I R. 239a; II R. 55a); removed a portion of the heroin; and replaced the bags (II R. 55a–57a).

In the meantime, Pardo-Bolland and Bruchon flew separately to New York (II R. 25a–26a, 41a–42a). Pardo-Bolland registered at the Hotel Elysee and made a reservation there for Arizti (II R. 26a–28a).[5] After Arizti arrived, the two men met in Arizti's room (I R. 179a–180a). Federal narcotics agents occupying the adjoining room overheard, with the aid of a microphone placed over the key hole of a

[5] In addition, under the assumed name of Lorenzo Suarez, he sent a cablegram to Coscia and Giacobetti in France informing them of his arrival in New York (I R. 58a–60a, 64a–69a, 161a, 163a–164a).

common door (I R. 28a),[6] Pardo-Bolland tell Arizti that he expected to see "the man" that day, and that "on business like this you have to be extra careful" (I R. 180a).

Bruchon was registered at the Americana Hotel under the name of LeRoux (II R. 25–26a, 42a). Pardo-Bolland, however, looked for him under the name Blanc; when he did not find him, he sent a cablegram under a false name to Coscia in France, addressed to "Carmen Lopez", saying "Cousin is not found address indicated" (I R. 168a). Pardo-Bolland returned to his own hotel room, where Federal narcotics agents stationed in the adjoining room, with the aid of a microphone taped against the bottom of a common door (I R. 27a, 181a–184a),[7] overheard him telling Arizti that "Blanc" was not registered at the Americana, that he could not understand why since it had never happened before, and that "this is risky business" (I R. 183a–185a).

Two days later, on February 20, Pardo-Bolland learned by an overseas telephone call from a "Dr. Guitterez" in France of the correct name (I R. 189a; II R. 40a, 59a). He then went to Bruchon's room at the Americana Hotel and stayed there about two minutes (I R. 199a; II R. 41a). Later in the afternoon, Bruchon dropped a set of keys into a trash basket on

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[6] The microphone did not in any way penetrate the door, to which it was attached by tape (II R. 5a–6a). The district court so found (I R. 452a). See p. 7 and n. 8, *infra*.

[7] The microphone did not in any way penetrate underneath the door, and in fact could not do so, as the district court found (I R. 27a, 452a; II R. 4a–5a, 10a–11a). See p. 7 and n. 8, *infra*.

a New York street; these keys, recovered by federal agents, fit the suitcases containing heroin which Arizti had brought to New York from France and left in Pennsylvania Station (II R. 45a–48a).

Early in the morning of February 21, Bruschon received a telephone call from Geneva, during which the name "Swissair" was mentioned (II R. 28a–31a). He booked passage with Swissair on the first available flight to Switzerland (II R. 52a–54a), and was arrested on the street shortly thereafter. When arrested he dropped an envelope which contained the claim checks for the four suitcases containing heroin at Pennsylvania Station (II R. 43a).

Arizti also received a telephone call during the early morning hours of February 21 (II R. 31a–32a) and was subsequently heard to tell Pardo-Bolland about a call advising them to leave immediately since "things are a little hot" (I R. 191a). They were arrested after making reservations for flights to South America (II R. 34a, 48a–52a).

ARGUMENT

1. (*a*) After conducting an extensive hearing, making an inspection of the rooms at the Hotel Elysee, and having photographs made of all pertinent locations (I R. 19a–37a, 451a–456a), the district court, on pre-trial motions to suppress, held admissible the evidence of conversations overheard by government agents with the aid of electronic amplifying devices.[8]

[8] Electronic devices were used as follows:

(1) In room 1103 of the Hotel Elysee, adjoining Pardo-Bolland's room, 1105, a microphone was taped to the bottom of a common door joining the two rooms, but it did not in any

The court specifically found that the microphones had not penetrated in any manner into the rooms under surveillance (I R. 451a–452a). Petitioner Pardo-Bolland's assertion that some physical penetration or trespass occurred (Pet. No. 521, pp. 5–6) is directly contradicted by the evidence of record (I R. 27a–28a, 44a–47a; II R. 3a–12a, 57a–59a), and it is contrary to the specific factual determination made by the district court on this issue (I R. 451a–452a), which the court of appeals found was supported by "substantial evidence" (348 F. 2d at 321). Consequently, this case is governed by *Goldman* v. *United States,* 316 U.S. 129, where a detectaphone was placed *against* a partition wall so that government agents could hear conversations in an adjoining room, rather than *Silverman* v. *United States,* 365 U.S. 505, where a "spike mike" *penetrated* the wall. The instant case, where the electronically obtained evidence (I R. 180a, 183a–185a, 188a–189a, 191a) was essentially merely corroborative, presents, we submit, no occasion to re-examine the *Goldman* decision or extend the principle of the *Silverman* case.

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way penetrate underneath such door (I R. 27a; II R. 4a–5a).

(2) In room 1102 of the Hotel Elysee adjoining co-defendant Arizti's room, 1102A, a microphone was taped against a key hole in a common door joining the two rooms, but it did not in any way penetrate the door (I R. 28a; II R. 5a–6a).

(3) In room 4926 at the Americana Hotel, adjoining Bruchon's room, 4924, a microphone was taped over a hole in a metal telephone-wire plate attached as a permanent fixture to the common wall separating the two rooms, but it did not penetrate into the plate or the wall (II R. 3a–4a, 59a). Petitioners are now apparently complaining specifically only about the microphones used in the rooms adjoining Pardo-Bolland's room and Arizti's room.

(*b*) Petitioners also contend that the admission of the agents' testimony regarding the overheard conversations was erroneous because the agents did not have a court order, and thus, in petitioners' view, violated Sections 738 and 740 of the New York State Penal Law (Pet. No. 521, p. 7; Pet. No. 601 Misc., p. 19). As the court of appeals pointed out (348 F. 2d at 323), however, these New York statutes were plainly not intended to apply to federal law enforcement officers. This is shown by the fact that the statutes contain no provision for a procedure to be followed by *federal* officers in obtaining the required order. The granting of the order is specifically limited to enumerated *State* officers.

2. The district court properly refused to order the United States to produce a pre-trial statement made by the witness Hyacinthe Lucchesi, a French national, to French law enforcement authorities (I R. 71a–74a, 83a–86a). Lucchesi testified on direct examination about the activities of co-conspirators Coscia and Giacobetti in connection with certain letters and the cablegrams from Pardo-Bolland (I R. 60a, 63a–64a, 66a, 69a–70a). On cross-examination, he testified that he had given the French Sureté a signed statement related to his testimony on direct (I R. 71a–72a, 83a–84a). The existence of the statement was unknown to any agent of the United States until Lucchesi testified about it at the trial, it was not in the actual or constructive possession of the United States, and it had never been shown to any agent of the United States (I R. 73a–74a, 79a, 84a, 87a).

When petitioners attempted to subpoena the statement from Andre Levergeois, a French police official who had been sitting with government counsel during the trial, Mr. Levergeois advised the court that he had possession of the statement (I R. 78a–79a) but did not have the authority to honor the subpoena since, under French law, it was secret (I R. 78a–85a).[9] There was no evidence at trial, other than Mr. Levergeois' testimony, regarding French law, and petitioners did not and do not now challenge his competency in the matter. In the circumstances, the district court was within its discretion in refusing to order production of the statement. Considerations of comity—of proper respect for the laws of a foreign country—have been held to preclude the production of documents for use in litigation where such production would violate foreign law. See *Application of Chase Manhattan Bank*, 297 F. 2d 611 (C.A. 2); *First National City Bank* v. *Internal Revenue Service*, 271 F. 2d 616 (C.A. 2), certiorari denied, 361 U.S. 948.

3. Petitioner Bruchon complains of the district court's instructions regarding certain items identifying him as Jean LeRoux which were taken from him at the time of his arrest[10] and subsequently introduced in evidence against him. When the items were offered in evidence, Bruchon objected on the ground

[9] He did testify on voir dire that Lucchesi's statement was consistent with his testimony in court (I R. 85a).

[10] The items were: a Swissair airlines ticket; a false passport in the name of Jean LeRoux; an inoculation card for Jean LeRoux; a French police identity card for Jean LeRoux (Pet. No. 601 Misc., p. 17).

that they were not instrumentalities of the crime and should have been returned to him (Pet. No. 601 Misc., p. 17).[11] The court stated that although it found the items to be instrumentalities of the crime not returnable under a motion to suppress, it would permit the jury to decide the question (I R. 337a). However, in the main charge, the court stated that, upon further consideration of the matter, it had determined that the items were instrumentalities of the crime as a matter of law, and that the jury was bound by that determination (I R. 337a). The latter instruction was correct (see *United States* v. *Nardone*, 127 F. 2d 521 (C.A. 2), certiorari denied, 316 U.S. 698), and cured the initial misstatement. *United States* v. *Tadio*, 223 F. 2d 759 (C.A. 2), certiorari denied, 350 U.S. 874. The instruction clarifying this issue (I R. 337a), when read in the context of the careful charge of the court emphasizing the necessity of considering the evidence as to each defendant separately (see I R. 385a–386a), did not have the effect of telling the jury that Bruchon was guilty.

4. The trial court charged that knowledge of illegal importation could be proved either by direct evidence of an unlawful importation or by the presumption created by 21 U.S.C. 174 (I R. 383a, incorporated

[11] No claim is now made that those documents which were a means of establishing a false identity were not instrumentalities of the crime.

as to Bruchon at I R. 386a). The trial court further charged that the presumption applied only if Bruchon had actual or constructive possession of the drugs (I R. 386a). Bruchon's argument that the evidence does not show possession by him is largely irrelevant; as the court of appeals pointed out, there was considerable evidence to justify an inference that Bruchon knew the narcotics were being imported, and hence no need to rely on the statutory presumption.

In any event, Bruchon's possession of the keys and the baggage claim checks gave him sufficient dominion over the heroin contained in the suitcases to establish constructive possession. See *Rodella* v. *United States,* 286 F. 2d 306, 311 (C.A. 9), certiorari denied, 365 U.S. 889. The government agents had searched the baggage in transit but had not yet seized the baggage or all of the heroin. It was, of course, reasonable for them to allow part of the heroin to continue in transit for the purpose of acquiring further information regarding the conspirators' participation in the scheme. See *United States* v. *Davis,* 272 F. 2d 149, 153 (C.A. 7). Hence, Bruchon did have sufficient ability to control the baggage to render the presumption applicable.

As for the instructions on this issue, the court's use of a simple example expressed in colloquial language (I R. 349a–350a) did not render the instruction unfair. See *United States* v. *Cohen,* 145 F. 2d 82, 93 (C.A. 2), certiorari denied, 323 U.S. 799.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions should be denied.

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OCTOBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965